SUPREME COURT OF THE UNITED STATES.

No. 144.—October Term, 1927.

Eleanor Saltonstall and Lawrence Brooks, Plaintiffs in Error, *vs.* Leverett Saltonstall, et al., Trustees, and Treasurer and Receiver General of the Commonwealth of Massachusetts.	In Error to the Supreme Judicial Court of the State of Massachusetts.

[February 20, 1928.]

Mr. Justice Stone delivered the opinion of the Court.

Plaintiffs in error are beneficiaries of a trust created by deed of Peter C. Brooks. After the death of the settlor the trustees, who, with certain Massachusetts tax officials, are defendants in error, filed in the Supreme Judicial Court of Massachusetts a petition for instructions which joined the beneficiaries of the trust and the officials as respondents, and asked a determination that the Massachusetts statutes taxing inheritances did not affect the property passing to the beneficiaries under the trust, or, if applicable, were "unconstitutional". The beneficiaries joined in the prayer of the bill and it was opposed by the state officials. The Supreme Judicial Court held the taxing acts applicable and valid. We may disregard the ambiguity of the trustees' contention below that the statutes were "unconstitutional", in so far as the state court understood that the federal Constitution was the basis for the objection and in its opinion sustained the statutes under that instrument. *Cissna* v. *Tennessee*, 246 U. S. 289; compare *Miedreich* v. *Lauenstein*, 232 U. S. 236. To that extent the case is properly here on writ of error. Jud. Code § 237(a).

In brief and argument here plaintiffs in error have stated various constitutional objections to the taxing acts. But as on the record none of them before the Supreme Judicial Court appear to have been based on the federal Constitution, we consider only the single objection discussed as a federal question by that court in its

opinion, viz. that the statutes as applied deprive plaintiffs in error of their property without due process of law because retroactive as to them.

On various dates between 1905 and 1907 Peter C. Brooks by indenture transferred to the trustees, defendants in error, or their predecessors, certain property upon trust, to pay the income to him for life or, at his option, to allow it to accumulate, and upon the death of himself and his wife to pay the income to his children, the plaintiffs in error, without any liability for their debts and without power of alienation or anticipation; with gifts over.

The trust instrument provided that its terms might be changed and the trust terminated in whole or in part by Peter C. Brooks, with the concurrence of one trustee. Before his death, on January 27, 1920, the trust was in fact thrice altered, the last time in 1919 by providing that during the life of Peter C. Brooks the income should be accumulated and added to the principal, so that from that date his interest in the trust was terminated, except for the power with one trustee to alter or terminate it.

At the time of the several transfers there were no Massachusetts statutes imposing an inheritance or transfer tax upon property passing to children, but before the death of Peter C. Brooks the statutes now assailed were enacted. By Mass. Acts 1909, c. 527, § 8, printed in the margin[1], the transfer of property passing to anyone on the exercise of a power of appointment or the failure to exercise it is made taxable as though a disposition or transfer of property taxable under the provisions of the statute taxing inheritances, Mass. Acts 1907, c. 563.

[1] "Section 8. Whenever any person shall exercise a power of appointment derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed to be a disposition of property by the person exercising such power, taxable under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven, and of all acts in amendment thereof and in addition thereto, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven and all acts in amendment thereof and in addition thereto shall be deemed to take place to the extent of such omission or failure . . . ."

Mass. Acts 1916, c. 268, § 1, amending Mass. Acts 1907, c. 563, § 1, as amended, imposes a tax on all property passing by will, intestate succession, or gift "made or intended to take effect in possession or enjoyment after the death of the grantor or donor." By § 4 of this act the tax is made applicable only to property or interests therein "passing or accruing upon the death of persons who die subsequently to the passage hereof."

In this and earlier cases the Massachusetts court has held that the tax authorized by these statutes is a tax upon "succession" which includes the "privilege enjoyed by the beneficiary of succeeding to the possession and enjoyment of property." See *Attorney General* v. *Stone*, 209 Mass. 186, 190; *Minot* v. *Winthrop*, 162 Mass. 113, 124; *Crocker* v. *Shaw*, 174 Mass. 266, 267. It has held also that the provisions of the trust instrument for change or termination of the trust by Peter C. Brooks with the consent of one trustee created a power of appointment within the meaning of Mass. Acts 1909, c. 527, § 8, and that the nonexercise of the reserved power in Brooks' lifetime as well as the fact that the interest of the beneficiaries took effect "in possession or enjoyment" after his death within the meaning of Mass. Acts 1916, c. 268, § 1, required the imposition of the tax as of the date of his death upon the entire interest in the trust passing to the plaintiffs in error. This construction of the statutes by the state court we accept, *Stebbins* v. *Riley*, 268 U. S. 137; *Chanler* v. *Kelsey*, 205 U. S. 466, 477, as we do its construction of the trust deed. *Nickel* v. *Cole*, 256 U. S. 222, 225; *Moffitt* v. *Kelly*, 218 U. S. 400.

The plaintiffs in error contend that as interpreted the statutes deprive them of property without due process because they are taxed on an interest they had already received before the enactment of the taxing acts. It is said that they had vested interests or remainders subject only to being divested by the exercise of the reserved power, which never happened; that as their remainders vested before the enactment of the taxing statutes these cannot constitutionally be applied to them under the rule laid down by this Court in *Nichols* v. *Coolidge*, 274 U. S. 531.

In *Nichols* v. *Coolidge* it was held that under the estate tax sections of the Revenue Act of 1919—which tax the privilege of transmission, *Nichols* v. *Coolidge, supra; New York Trust Co.* v. *Eisner*, 256 U. S. 345—property of which a donor had made an outright conveyance several years before the enactment of the statute could not, on his death after its enactment, be included as part of

his taxable gross estate at its value at the time of his death. But we are here concerned, not with a tax on the privilege of transmission, not with an attempt to tax a donor's estate for an absolute gift made when no tax was thought of, and to do so at the probably appreciated value which the gift now bears, but with a tax on the privilege of succession, which also may constitutionally be subjected to a tax by the state whether occasioned by death, *Stebbins* v. *Riley, supra,* or effected by deed, *Keeney* v. *New York,* 222 U. S. 525; *Chanler* v. *Kelsey, supra; Nickel* v. *Cole, supra.* The present tax is not laid on the donor, but on the beneficiary; the gift taxed is not one long since completed, but one which never passed to the beneficiaries beyond recall until the death of the donor; and the value of the gift at that operative moment, rather than at some later date, is the basis of the tax.

So long as the privilege of succession has not been fully exercised it may be reached by the tax. See *Cahen* v. *Brewster,* 203 U. S. 543; *Orr* v. *Gilman,* 183 U. S. 278; *Chanler* v. *Kelsey, supra; Moffitt* v. *Kelly, supra; Nickel* v. *Cole, supra.* And in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax, may even in the case of a vested remainder be restricted or suspended by other legal devices. A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax. *Bullen* v. *Wisconsin,* 240 U. S. 625. The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another. And so the property passing to the beneficiaries here was acquired only because of default in the exercise of the power during the donor's life and thus was on his death subject to the state's power to tax as an inheritance.

Without considering the other statutes involved, we need not go further than to say that the statute of 1909, imposing the tax because of the failure to exercise the power of appointment, does not deprive plaintiffs in error of their property without due process of law.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.